90-880

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SNAP-ON TOOLS CORPORATION,
KENNETH BALDWIN, and KEITH A. KAISER,
Petitioners,

v.

JAMES F. BOYER and MARY R. BOYER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When resolving a motion to remand a case previously removed from state court, may a federal district court consider the underlying facts of the case to find that the plaintiffs fraudulently joined non-diverse defendants by asserting groundless claims against them?

2. Must a federal district court remand a case previously removed from state court when the plaintiffs' claims against a diverse defendant are subject to the same dispositive defense as claims against non-diverse defendants, whom the district court determined were fraudulently joined by the plaintiff?

LIST OF PARTIES

All of the parties to the proceeding below are listed in the caption to this case.

Petitioner Snap-on Tools Corporation has no parent companies or subsidiaries to list pursuant to Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Snap-on Tools Corporation, Kenneth Baldwin, and Keith A. Kaiser, respectfully pray that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Third Circuit in the above-entitled proceeding on September 5, 1990.

OPINIONS BELOW

The opinion of the court of appeals is reported at 913 F.2d 108, and is reprinted in the appendix hereto at p. 1a.

The memorandum decision of the United States District Court for the Middle District of Pennsylvania (Rambo, J.) has not been reported. It is reprinted in the appendix hereto at p. 12a.

JURISDICTION

The court of appeals entered its opinion and judgment on September 5, 1990.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1447. Procedure after removal generally

(c) . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

STATEMENT OF THE CASE

Respondents James Boyer and Mary Boyer filed a complaint in state court in Pennsylvania, where they reside, against petitioner Snap-on Tools Corporation ("Snap-on") and two Snap-on employees—petitioners Kenneth Baldwin ("Baldwin") and Keith Kaiser ("Kaiser"). Snap-on

is a Delaware corporation with its principal place of business in Wisconsin, and Baldwin and Kaiser were residents of Pennsylvania.

In their complaint, the Boyers generally alleged that petitioners defrauded Mr. Boyer into entering into a dealership with Snap-on, which sells tools to dealers for resale. Following termination of his dealership, Mr. Boyer had signed an agreement with Snap-on that included a mutual release of all claims arising out of the dealership.

Pursuant to 28 U.S.C. § 1441(a), petitioners filed a petition for removal to the United States District Court for the Middle District of Pennsylvania. The removal petition asserted diversity jurisdiction under 28 U.S.C. § 1332 on the basis that the Boyers had fraudulently joined Baldwin and Kaiser to defeat diversity and prevent removal.

The Boyers filed a motion to remand. The district court denied the motion, concluding that "the in-state defendants would prevail in a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement." (pp. 22a-23a, *infra*).

Petitioners then moved for summary judgment. The district court granted the motion, ruling, *inter alia*, that Mr. Boyer waived all claims against the petitioners by signing the mutual release. (p. 12a, *infra*).

The Boyers appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291. That court reversed. The court of appeals concluded that the non-diverse defendants had not been fraudulently joined, and, therefore, ruled that the district court did not have subject matter jurisdiction based on diversity of citizenship.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS'S OPINION CONFLICTS WITH THE LAW IN OTHER CIRCUITS, IS BASED UPON A MISINTERPRETATION OF ONE SUPREME COURT DECISION, AND IMPAIRS PROPER DIVERSITY JURISDICTION.

The court of appeals offered three justifications for its holding that the Boyers did not fraudulently join petitioners Baldwin and Kaiser. The first two justifications are inconsistent with well-established law in other federal circuits concerning fraudulent joinder of non-diverse defendants. The third justification is based upon a misreading of this Court's opinion in *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146 (1914).

1. The court of appeals noted that the Boyers did not commit outright fraud by misrepresenting "their Pennsylvania citizenship or that of Baldwin and Kaiser." (p. 8a, *infra*). Courts in other circuits have held that the absence of fraud is not dispositive. "Fraudulent joinder" is a term of art. If a plaintiff fails to state a cause of action against non-diverse defendants, joinder of the non-diverse defendants is deemed fraudulent, and the erstwhile lack of diversity will not prevent removal. *E.g.*, *Aids Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1003-04 (4th Cir. 1990); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *Roe v. General American Life Ins. Co.*, 712 F.2d 450, 452 n.* (10th Cir. 1983); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979). This Court should grant the petition to resolve the conflict between the court below and the courts of appeals in other circuits.

2. The court of appeals concluded that "this is not a case where the action against the individual defendants is defective as a matter of law." (p. 8a, *infra*). The court of appeals apparently concluded that fraudulent joinder occurs only when a plaintiff's claim has an obvious legal defect, such as a statute of limitations defense

manifest on the face of the complaint or the defendants' immunity from suit as a matter of law. (p. 9a, *infra*). The court of appeals stated that, even assuming a district court may conduct a "limited piercing" of the pleadings to discover fraudulent joinder when the complaint facially states a cause of action, a district court may not make a "summary judgment type inquiry." (p. 9a, *infra*).

This justification confuses the law concerning fraudulent joinder. Other circuits have held that joinder of a resident defendant against whom there is in fact no cause of action will not defeat diversity jurisdiction. *E.g., Aids Counseling & Testing Centers v. Group W Television*, 903 F.2d at 1003-04; *Roe v. General American Life Ins. Co.*, 712 F.2d at 452 n.*; *Tedder v. F.M.C. Corp.*, 590 F.2d at 117; *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964); *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). In determining whether a plaintiff has a viable cause of action, the district court may go beyond the pleadings and consider the underlying facts of the case. *E.g., Aids Counseling & Testing Centers v. Group W Television*, 903 F.2d at 1003-04; *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1449 (11th Cir. 1983); *McCabe v. General Foods Corp.*, 811 F.2d at 1339; *Dodd v. Fawcett Publications, Inc.*, 329 F.2d at 85. The only limitation on the district court's consideration of the facts is that the issue of fraudulent joinder must be capable of summary determination. *E.g., B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 n.9 (5th Cir. 1981); *Dodd v. Fawcett Publications, Inc.*, 329 F.2d at 85.

The district court's decision in this case is consistent with these principles. The district court summarily determined that Mr. Boyer in fact did not have a cause of action against Baldwin and Kaiser, the in-state defendants, because of the mutual release in the termination agreement. (p. 22a-23a, *infra*). The court of appeals,

by reversing the district court, placed itself in conflict with other courts of appeals. This Court should grant the petition to resolve that conflict.

3. The court of appeals concluded that it "need not decide the extent of permissible inquiry into the validity of the release of Boyer's claims against Baldwin and Kaiser, the non-diverse defendants, because that issue . . . is equally applicable to Snap-on." (p. 9a-10a, *infra*). Citing this Court's decision in *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146 (1914), the court of appeals held that "where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses." (p. 11a, *infra*).

This final rationale is based upon a misreading of *Cockrell*. In that case, a Kentucky resident sued a diverse railway company and two non-diverse employees of the company. The railway company filed a petition for removal simply alleging that the claims against the in-state defendants were groundless. The state court refused to surrender its jurisdiction, proceeded to a trial, and issued a judgment against the company. *Cockrell*, 232 U.S. at 150.

The Supreme Court affirmed, holding that a party seeking removal must do more than merely "traverse the allegations upon which the liability of the resident defendant is rested." *Id.* at 152. The railway company had a burden to present evidence showing that the joinder of the resident defendants "was merely a fraudulent device to prevent removal." *Id.* at 153.

Cockrell stands for the narrow principle that a defendant may not prove fraudulent joinder merely by denying the allegations of a complaint. That principle does not support the court of appeals's decision in this case. Snap-on presented evidence and legal precedent establishing that the mutual release barred all claims

against the non-diverse defendants. Since the remaining parties were diverse, Snap-on had a right to remove the case to a federal forum.

The Court in *Cockrell* stated, in *dicta*, that because the company's liability was predicated solely upon the alleged negligence of the two employees, the company's general denial of liability "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plainiff's case was ill founded as to all defendants." *Id.*

The court of appeals focused on this portion of the *Cockrell* opinion and held that a district court may not find that non-diverse defendants were fraudulently joined based on a dispositive defense that applies equally to diverse defendants. The court of appeals's reasoning is flawed.

Unlike the claims against the railway company in *Cockrell*, Mr. Boyer's claims against Snap-on are not premised solely on the conduct of Baldwin and Kaiser. In its summary judgment memorandum, the district court concluded that its remand ruling effectively dismissing the non-diverse defendants was not the law of the case as to Snap-on because the Boyers presented "arguments that pertain only to the corporate defendant." (p. 16a, *infra*).

Moreover, the court of appeals's reading of *Cockrell* creates the anomalous result of denying a diverse party its otherwise undeniable right to a federal forum because of the happenstance of a dispositive affirmative defense shared with a non-diverse party. If Snap-on's dispositive defense was slightly different from that of Baldwin and Kaiser, Snap-on unquestionably would have a right to removal, and the district court would have subject matter jurisdiction based on diversity of citizenship. But because Snap-on's dispositive defense—the release—also applied to Baldwin and Kaiser, a case that does not be-

long in any court must now be remanded to state court. This sort of analysis is without support by any logic, permits the most blatant form of sharp pleading to deny to a party an otherwise undisputed right to a federal forum, and thereby undermines diversity jurisdiction. This Court should grant the petition to clarify its early decision in *Cockrell* and to provide guidance to lower courts concerning how and when a district court may properly determine that a plaintiff fraudulently joined claims against non-diverse defendants.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 4, 1990

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APPENDIX

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APPENDIX

Filed September 5, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5221

JAMES F. BOYER and MARY R. BOYER,

v.

SNAP-ON TOOLS CORPORATION,
KENNETH BALDWIN and KEITH A. KAISER

JAMES F. BOYER and MARY R. BOYER,
Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 89-00050)

Argued August 2, 1990

Before: SLOVITER, SCIRICA and ALITO,
Circuit Judges

(Filed September 5, 1990)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This is an appeal by a former dealer of Snap-on Tools Corporation of the district court's grant of summary judgment for defendants Snap-on and two of its employees. We must consider at the outset whether there was subject matter jurisdiction on the basis of diversity of citizenship and whether the district court erred in denying the plaintiffs' motion to remand.

I.

Procedural Background and Facts

Appellant James Boyer and Snap-on Tools Corporation, a corporation which sells automotive hand tools to a nationwide network of dealers for resale to automechanics, entered into a Dealership Agreement (Agreement) in July, 1985. In meetings leading to the signing of the agreement, Boyer met with appellee Kenneth Baldwin, a branch manager at Snap-on, and Keith Kaiser, a Snap-on field manager. Boyer invested more than $40,000 in his dealership, had an inventory of more than $29,000 worth of Snap-on tools, and mortgaged his home in order to borrow money to invest in the dealership. By late 1987 and early 1988, the dealership proved

unprofitable for Boyer and Snap-on, and Boyer was orally advised by Snap-on personnel at a January 14, 1988 meeting that he would be terminated.

The Snap-on Agreement provided that on termination of a dealership "with the consent of the Company, the Dealer may sell to the Company at the price paid by the Dealer any of the Products which have been purchased by the Dealer and which remain in its possession in new, saleable condition." App. at 52. In accordance with this provision, Boyer participated in a two-day inventory and turn-in of his tools at the Snap-on branch office in Harrisburg on February 11 and 12, 1988. On the first day, Baldwin presented Boyer with a Termination Agreement that included a release clause which specified, *inter alia*, that "both parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement." App. at 149.

Boyer averred in an affidavit and testified on deposition that he was told by a Snap-on employee, Michael Brown, on the first day of the inventory turn-in that if he did not sign the termination agreement (which contained the above release), Snap-on would not pay Boyer for the turned-in tools or other funds allegedly owed by Snap-on to Boyer, that Brown repeated this the second day of the tool turn-in, and that Boyer signed the Agreement later that day based on Brown's representations, because he believed that he would otherwise lose his home and car. Boyer testified that he consulted with his wife, but not an attorney, between the first and second days of the tool turn-in.

The Boyers,[1] residents of Pennsylvania, filed this complaint on December 13, 1988 in the Court of Common Pleas of Lebanon County, Pennsylvania, against Snap-on,

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[1] Mary Boyer, James Boyer's wife, was not a party to the dealership agreement. Her claims are largely derivative. References to "Boyer" will include her claims where applicable.

a Delaware Corporation with its principal place of business in Wisconsin, and Baldwin and Kaiser, both residents of Pennsylvania. The complaint alleged fraud and deceit, fraudulent conspiracy, interference with contract, wrongful termination of dealership, violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, and intentional infliction of emotional distress.

In his detailed 47-page complaint, Boyer alleges five broad aspects of defendants' fraud and misrepresentations. First, Boyer contends that Snap-on through its written materials and through oral statements of Kaiser misrepresented the profitability of the dealership and the risk of failure during the period of time leading up to the signing of the Agreement. Second, he contends that they fraudulently misrepresented the number of customers in Boyer's territory in an inaccurate survey. Third, he alleges that both Kaiser and Baldwin misrepresented the amount of initial capital needed to begin a dealership and that his dealership was bound to fail because he was undercapitalized.

Fourth, Boyer alleges that while he was a dealer Snap-on engaged in a fraudulent scheme through its "Promotional Tools Program" which involved a mandatory shipment of tools selected by Snap-on, initially represented to be $200 to $300 weekly but which increased by 1987 to $1,112 per week. Because he did not fulfill all of the requirements of that program, he was penalized by being barred from placing orders for his customers during 56 weeks of his dealership. Finally, Boyer alleges wrongful termination of his dealership. In addition to fraud, the complaint alleges breach of contract and warranties against Snap-on.

The defendants filed a removal petition on January 9, 1989. Although on the face of the complaint there was no federal question or complete diversity of citizenship because the Boyers and the individual defendants were Pennsylvania citizens, the removal petition alleged that

Baldwin and Kaiser were "fraudulently and improperly joined" because the complaint does not state a cause of action against the individual defendants, because these defendants were alleged to have acted only in the interests of Snap-on and were therefore privileged under Pennsylvania law, and because Boyer signed a release against the individual defendants.

The Boyers filed a motion to remand under 28 U.S.C. § 1447(c). The district court, without expressly holding that Baldwin and Kaiser were sham defendants, denied the motion to remand on the ground that the "in-state defendants would prevail in a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement." App. at 160.

The defendants thereafter moved for summary judgment, primarily relying on the release clause in the Termination Agreement. The Boyers opposed the motion, arguing that the release was procured through fraud, economic duress, or in violation of Snap-on's fiduciary duty; that the release covered claims of which the Boyers were unaware; that at the time the Boyers signed the release they were unaware of the alleged fraudulent practices, which they first learned of in July 1988, when they saw an NBC television news story and a Forbes Magazine article detailing Snap-on's practices; and that Mary Boyer, who did not sign the release, had an independent action against the defendants.

The district court granted the motion for summary judgment. The court rejected Boyer's claim of economic duress and fraud in the procurement of the release, and held that the release was broad enough to cover undiscovered fraud. The Boyers filed a timely appeal.

II.

Discussion

A fortiori, we do not reach the propriety of the district court's grant of summary judgment unless we are satisfied that the district court had subject matter jurisdiction.

That, in turn, is dependent upon its decision to disregard the presence of the two individual defendants whose citizenship would destroy diversity.

As a general proposition, plaintiffs have the option of naming those parties whom they choose to sue, subject only to the rules of joinder of necessary parties. While the plaintiffs' decision in this regard may have repercussions for purposes of diversity jurisdiction, there is no reason for a court to interfere with this inevitable consequence of a plaintiff's election unless the plaintiff had impermissibly manufactured diversity or used an unacceptable device to defeat diversity.

There are substantially more cases dealing with a plaintiff's attempt to manufacture diversity than to destroy it. The first Judiciary Act of 1789, 1 Stat. 73, sought to restrain manufactured diversity jurisdiction by virtue of assignment of the plaintiff's claim, and a more general effort to avoid collusively created diversity was enacted in 1875. *See* Pub. L. No. 61-7031, 36 Stat. 1098. The current version of that statute, codified at 28 U.S.C. § 1359, requires the federal court to dismiss or remand a suit in which any party, by assignment or otherwise, has been improperly or collusively joined to invoke federal diversity jurisdiction. *See generally Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969).

In contrast, until 1988 there was no statutory ban directed to the avoidance of federal diversity jurisdiction.[2] As the commentary in the highly regarded *ALI Study of the Division of Jurisdiction between State and Federal Courts* (1969) notes, "[t]here is . . . a qualitative difference between a device designed to invoke federal jurisdiction and one designed to avoid it. In the former instance, the already overburdened federal courts are be-

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[2] The 1988 amendment curtailed the practice of naming fictitious defendants to destroy diversity. *See* 28 U.S.C. § 1441(a) (1988) (as amended).

ing asked to adjudicate a case that, in the absence of the device, would fall outside their statutory, and perhaps their constitutional, competence. In the latter, if the device succeeds, a case depending on state law merely remains in the state court." *Id.* at 160. Of course, we recognize, as did the ALI Reporter, that "[s]o long as federal diversity jurisdiction exists . . . the need for its assertion may well be greatest when the plaintiff tries hardest to defeat it." *Id.* However, that concern cannot defeat plaintiff's right to retain as defendants those parties properly joined, even if the consequence is that defendants must litigate in state court.

Defendants removed Boyer's action from state court pursuant to 28 U.S.C. § 1441. Plaintiffs' motion to remand was filed pursuant to 28 U.S.C. § 1447(c) which provides, in relevant part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (1988). The removal statutes "are to be strictly construed against removal and all doubts should be resolved in favor of remand." *Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987) (citing *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985)), *cert. dismissed sub. nom. American Standard v. Steel Valley Auth.*, 108 S.Ct. 739 (1988). Because a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists, a removing party who charges that a plaintiff has fraudulently joined a party to destroy diversity of jurisdiction has a "heavy burden of persuasion." *Steel Valley*, 809 F.2d at 1010, 1012 n. 6 (quoting *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)).

This court has recently stated that joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute

the action against the defendant or seek a joint judgment." *Abels*, 770 F.2d at 32 (quoting *Goldberg v. CPC Int'l*, 495 F. Supp. 233, 239 (N.D.Cal. 1980)); *see also* 1A *Moore's Federal Practice*, ¶ 0.161[2] at 274-76 (2d ed. 1989). A district court must resolve all contested issues of substantive fact in favor of the plaintiff and must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. *See B., Inc.*, 663 F.2d at 549; *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3802 (May 31, 1990) (No. 89-1885). "If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983).

Turning to this case, we note first that there is no suggestion by defendants that plaintiffs have falsely alleged their Pennsylvania citizenship or that of Baldwin and Kaiser. In other words, this is not a situation where "there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." *B., Inc.*, 663 F.2d at 549; *see Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

Second, this is not a case where the action against the individual defendants is defective as a matter of law. *See* 1A *Moore's Federal Practice* ¶ 0.161[2] at 274 ("The joinder may be fraudulent if the plaintiff fails to state a cause of action against the resident defendant, and the failure is obvious according to the settled rules of the state."). Under Pennsylvania law there is a cause of action against employees whose fraud and misrepresentations contributed to plaintiff's damages, even if these actions were taken in the course of their employment. *See Loeffler v. McShane*, 372 Pa. Super. 442, 446-47, 539 A.2d 876, 878 (1988) (quoting *Wicks v. Milzoco*

Builders, Inc., 503 Pa. 614, 621, 470 A.2d 86, 90 (1983)) ("officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor"); *see also Village at Camelback Property Owners' Ass'n v. Carr*, 371 Pa. Super. 452, 462-63, 538 A.2d 528, 533-34 (1988), *aff'd*, 572 A.2d 1 (1990); *Moy v. Schreiber Deed Sec. Co.*, 370 Pa. Super. 97, 101-03, 535 A.2d 1168, 1170-72 (1988); *Shonberger v. Oswell*, 365 Pa. Super. 481, 530 A.2d 112 (1987). Thus, there is no basis to analogize this case to *Tedder v. F.M.C. Corp.*, 590 F.2d 115 (5th Cir. 1979) (per curiam), cited by defendants, where the court held that joinder of non-diverse fellow employees could be disregarded because there was no reasonable basis under which plaintiffs could avoid the state's broad grant of immunity conferred on fellow employees.

Defendants argue that the court may pierce the pleadings to determine whether there has been a fraudulent joinder. Assuming some piercing is appropriate to decide whether plaintiffs have asserted a "colorable" ground supporting the claim against the joined defendant, that inquiry is far different from the summary judgment type inquiry made by the district court here. The limited piercing of the allegations to discover fraudulent joinder is illustrated by *Smoot v. Chicago, Rock Island & Pac. R.R. Co.*, 378 F.2d 879 (10th Cir. 1967), where the non-diverse employee of defendant railroad had uncontestedly discontinued his employment with the railroad 15 months before the accident in question. *See also Lobato v. Pay Less Drug Store, Inc.*, 261 F.2d 406 (10th Cir. 1958) (absence of allegations that individual non-diverse defendants participated in tortious acts alleged).

In this case, we need not decide the extent of permissible inquiry into the validity of the release of Boyer's claims against Baldwin and Kaiser, the non-diverse defendants, because that issue, which the district court stated "is likely to be dispositive of plaintiffs' claims against Baldwin and Kaiser," is equally applicable to

Snap-on. In fact, ultimately, that is what the district court decided when it granted summary judgment. Thus, the district court, in the guise of deciding whether the joinder was fraudulent, stepped from the threshold jurisdictional issue into a decision on the merits. As the Supreme Court held in *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146 (1914), this it may not do.

Because *Cockrell* is directly applicable, the underlying facts and the procedural posture are significant. The administrator of an estate, who was a Kentucky citizen, sued a Virginia railroad company and its engineer and fireman, who were citizens of Kentucky, for negligently causing the death of the intestate. The defendants removed the case to federal court on the ground that the charges of negligence against the employees were fraudulently made, thereby vesting the federal court with jurisdiction over the diverse parties, the railroad and administrator. The Supreme Court, after noting first that under Kentucky law employees were jointly liable with the employer for negligent acts committed by the employees, held that removal was improper.

The railroad had sought removal on the ground that the charges of negligence against the employees were false and untrue and made for the sole and fraudulent purpose of affording a basis for the fraudulent joinder. The Court stated that while this contention "may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all . . . it did not show a fraudulent joinder of the engineer and fireman." *Id.* at 153. The Court continued:

> As no negligent act or omission *personal to the railway company* was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, *the showing manifestly went to the merits of the action as an entirety and not to the joinder*; that is to say, it indicated that the plaintiff's case was ill founded as

> to all the defendants. . . . As [the two employees] admittedly were in charge of the movement of the train and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company.

Id. (emphasis added).

Although Snap-on seeks to distinguish *Cockrell* on the ground that the Boyers asserted certain allegations against Snap-on which were not asserted against the non-diverse employees, we find *Cockrell* indistinguishable because the dispositive defense, that based on the release, was raised by all three defendants. Similarly, the Boyers' arguments that the release was invalid involve identical legal and factual issues applicable to the individual defendants and Snap-on. Informed by *Cockrell*, we hold that where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

III.

Conclusion

For the reasons set forth above, we will vacate the entry of summary judgment entered against the plaintiffs because the district court was without jurisdiction; we will reverse the district court's order denying the plaintiffs' motion to remand; and we will remand to that court with directions to remand this case to the state court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 89-0050

(Judge Rambo)

JAMES F. BOYER and MARY R. BOYER,
Plaintiffs

v.

SNAP-ON TOOLS CORPORATION,
KENNETH BALDWIN and KEITH A. KAISER,
Defendants

MEMORANDUM

[Filed Feb. 14, 1990]

This memorandum is written to address defendants' motion for summary judgment. Appropriate briefing has been completed. Background to the action follows.

In May 1985 plaintiff James Boyer (Boyer) became interested in the possibility of becoming a dealer for Snap-On Tools Corporation (Snap-On). In pursuit of this idea, Boyer met with several Snap-On representatives at which time he received a company brochure and discussed the position with them in general. Plaintiff had additional opportunity to learn about the position through two additional talks with Snap-On representatives. Boyer alleges that representations made to him by the Snap-On employees and in the brochure represented fraudulent assertions about, among other items, Boyer's potential income, the makeup and size of his sales territory, support Snap-On would provide Boyer, and necessary start-up

costs for Boyer. These alleged misrepresentations form the basis of Count I, "Fraud and Deceit." [1]

Once plaintiff signed on as a Snap-On dealer he asserts he was made to participate in a fraudulent "Promotional Tools Program." In this program defendant selected several tools on a monthly basis for dealers to offer at discounts. Boyer says that dealers were forced to participate in this "mandatory" program or be punished by having their credit stock sales halted. This program is a basis for part of Count II, "Fraudulent Conspiracy," and Count III, "Unlawful Interference with Business."

After approximately two and a half years as a dealer, Snap-On terminated Boyer's dealership. It is plaintiffs' position that Snap-On had no basis for ending his dealership and that the termination violated the Pennsylvania Fair Dealership Act and its Unfair Trade Practices and Consumer Protection Law provisions concerning notice of termination. This claim of "Wrongful Termination" forms the basis of Count IV. Counts VI and VII spell out additional claims of breach of contract and breach of both express and implied warranties. Plaintiffs also allege defendant's conduct constitutes the intentional tort of infliction of emotional distress.

Summary judgment is warranted when pleadings, affidavits and other materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is this court's responsibility to determine whether there exists a genuine and material issue of fact. In making the decision "[t]he evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

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[1] Plaintiff also "rode" with several dealers on separate work days to observe and question them about the job.

Defendant contends in its motion for summary judgment that a general release that all parties signed bars this entire suit. Circumstances surrounding the signing of the termination agreement containing the release are described in the light most favorable to Boyer as the nonmovant. All references to plaintiff are to plaintiff James Boyer unless indicated they are to his wife.

On January 14, 1988, plaintiff met with two Snap-On managers who "verbally advised [him] that [Snap-On] intended to terminate [his] status as a dealer." Complaint ¶ 71. Plaintiff asserts that he was then asked on what date he would end the dealership. He responded on January 15, 1988 that he would stop serving customers and return his tools in three weeks. Plaintiffs' Response to Defendant's Statement of Material Facts As To Which There is No Genuine Issue To Be Tried in Support of Defendants' Motion of Summary Judgment (Plaintiffs' Response to Material Facts), ¶¶ 14, 15, 20.[2]

As part of the dealer termination process, a dealer participates in a tool turn-in. This is merely the procedure during which company representatives and the dealer inventory the dealer's tool stock. Those tools which are in "saleable" condition, Snap-On buys back. Complaint, Exhibit "A", at ¶ 9(B). The procedure began for Boyer on February 12, 1988. At some point during the day, Kenneth Baldwin, the company's Harrisburg branch manager, gave Boyer a termination agreement. Boyer did not sign it, stating he needed time to read it. Boyer Deposition, Doc. of Record 37, Vol. II, p. 358, lines 5-6. At some later point that day, Brown, Boyer's field manager, "expressed to [Boyer] that without signing the

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[2] Plaintiff acknowledges that as of the date of the meeting, he was "unable to pay his tool bills on the immediate basis required by Snap-On, . . ."; however, plaintiff denies responsibility for that inability. Instead he asserts he was unable to pay solely because of the promotional tools program. Plaintiffs' Response to Material Facts, ¶ 16.

contract [Boyer] could, in fact, not get the money that would be owed [him] for the tools." *Id.* lines 18-20. Boyer took the agreement home that evening, read it, discussed it with his wife, and returned to tool trade-in the next day without having "yet" signed the agreement. *Id.* p. 359, lines 10, 21-25. Brown again informed Boyer he needed to sign the agreement to receive the tool money. *Id.* p. 358, line 25; p. 359, line 1. Boyer then signed the agreement and proceeded with the trade in. *Id.* p. 359, line 3. Boyer states he was afraid that if he did not get the tool money, he thought he would lose his house and car. Boyer Stipulation, Doc. of Record 29, Exhibit "A," ¶ 14.[3]

It is Boyer's position that Brown's statements that Boyer had to sign the agreement in order to receive the tool money were false. They were allegedly false because they contradicted language in the original dealer agreement and Baldwin's deposition statements that the company would repurchase a terminating dealer's tools without a signed termination agreement. Baldwin Deposition, Doc. of Record 38, p. 84, lines 8-11; p. 86, lines 10-13; Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 26-28 (Plaintiffs' Brief in Opposition). As a result, because the statements were false and Boyer did not realize they were, he was fraudulently induced into signing the termination agreement.

Both parties present a number of arguments concerning the validity of the release. Defendants argue that the release effectively bars the current suit by virtue of an earlier court ruling wherein the court held that the release was valid against two individual defendants. De-

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[3] Boyer subsequently received over $29,000 for certain of his tools and other materials. Snap-On refused to repurchase some tools and paid Boyer less than the current dealer cost for tools which were noticeably worn. Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, ¶¶ 21, 31; Plaintiffs' Response to Material Facts, ¶ 31.

fendant asserts that holding is the law of the case and plaintiffs counter that that doctrine is inapplicable. The doctrine of the law of the case is largely one of judicial efficiency and economy. Once a final decision is rendered, absent unfairness or error, the doctrine permits the court to forego reconsidering the decision. In this case, plaintiffs' state court complaint was removed. They contested the removal and argued in their motion to remand that the release was invalid, in large part because of economic duress. The order the court filed on May 16, 1988 stated: "This court has reviewed the entire record and is of the opinion the in-state defendants would prevail on a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement." The court declines to adopt that statement as the law of the case so that it may give consideration to the plaintiffs' newly presented arguments that pertain only to the corporate defendant.

Plaintiffs argue two exceptions to the presumed validity of a signed release. Under Pennsylvania law, "a signed release is binding unless executed through fraud, duress, accident or mutual mistake." *Young v. Robertshaw Controls Co.*, 430 F. Supp. 1265, 1268 (E.D. Pa. 1977) (citing *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975)); *Reed v. Smithkline Beckman Corp.*, 569 F. Supp. 672, 674 (E.D. Pa. 1983). Plaintiffs do not argue that the release is invalid because of mistake or accident. They do argue economic duress. That defense was fully addressed in the Motion to Remand briefs. Plaintiffs present no new facts or law or reasons why there would be any different ruling on that issue for the corporate defendant than for the individual defendants. The court, therefore, adopts its earlier position that no economic duress exists to invalidate the release.

The party seeking to have the release declared invalid because of fraud has the burden of proving that fraud. The evidence must be clear, precise and convincing.

Beardshall v. Minuteman Press Int'l, Inc., 664 F.2d 23, 26 (3d Cir. 1981). The five elements of fraud are: (1) a false or fraudulent representation; (2) which defendant knew, or ought to have known, was false; (3) which is intended to be acted upon by plaintiff; (4) which in fact was acted upon and justifiably relied upon by plaintiff; (5) to his detriment." *Contractor Utility Sales Co. v. Certain-Teed Corp.*, 748 F.2d 1151, 1154 (7th Cir. 1984) (interpreting Pennsylvania law).

As an initial argument plaintiffs assert that issues of fraud are inappropriate for resolution through summary judgment. The court disagrees. Fraud may be handled in such a motion as long as it is addressed according to general summary judgment principles. Here, to prove fraud, plaintiffs set forth the elements of fraud and concluded that because Brown "obtained Boyer's signature on the Dealer Termination Agreement by way of a false statement as to company policy," they have met each element and, thus, it should be left to a jury to decide if the release was procured by fraud. Brown's comments, assuming they were made, basically paraphrase the termination agreement which states:

> The Company has agreed to pay the Dealer for the return of Dealer's inventory at current Dealer cost even though some of the merchandise may have been purchased in a prior year at a lower cost. . . . The Dealer will deliver the inventory to the Company by March 11th 1988 for final accounting, which is required before obligating the Company, and this repurchase of inventory, all at current Dealer cost, shall serve as consideration for this Agreement and the complete release of claims stated below.

Appendix to Defendants' Motion for Summary Judgment, filed July 31, 1989, Exhibit 1.

Based on the evidence before it, taking it in the light most favorable to plaintiffs, the court finds that plaintiffs

have not established a level of proof sufficient to establish fraud. At bottom, plaintiffs have attempted to recast their economic duress defense as a fraud defense which they have not successfully done. The release is valid.

Plaintiffs' argument that claims of undiscovered fraud are not barred by the release needs to be considered. Parties agree that the release is a general one. The scope of a release is to be determined from its language. Ordinary meanings are to be attributed to the words, unless is it clear that a different meaning was intended by the parties. The release contained in the termination agreement states:

> Except as provided above, parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement. The Dealer agrees that fair consideration has been given by the Company for this Agreement and fully understands this complete release of claims and the negotiated terms of this Agreement. This paragraph is intended to apply and extend to any agents, representatives, heirs, employees and officers of either party to this agreement, and it is effective as of the date first written.

The release is broad enough to include the present suit. All of the actions in question occurred prior to the date on which plaintiff signed the release. There is no reason to conclude that the parties did not intend the agreement to be the end of their relationship and therefore, include undiscovered claims. *See Applebaum v. State Mut. Auto. Ins. Co.*, 626 F. Supp. 1299, 1306 (M.D. Pa. 1986). For this reason and others presented in defendants' brief, the court concludes the release valid against claims of "undiscovered fraud." The court also finds no merit in plaintiffs' other defenses to the release and finds that Mrs. Boyer has no basis to assert a claim for reasons outlined in defendants' brief.

An appropriate order will be issued.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: February 14, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 89-0050

(Judge Rambo)

JAMES F. BOYER and MARY R. BOYER,
Plaintiffs

v.

SNAP-ON TOOLS CORPORATION, KENNETH BALDWIN and KEITH A. KAISER,
Defendants

ORDER

[Filed Feb. 14, 1990]

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

(1) defendants' motion for summary judgment is granted;

(2) the Clerk of Court is directed to enter judgment in favor of defendants and against plaintiffs and close this file.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: February 14, 1990.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case Number: 1-CI-89-0050

JAMES F. BOYER, and MARY R. BOYER,
Plaintiffs

v.

SNAP-ON TOOLS CORPORATION, KENNETH BALDWIN and KEITH A. KAISER,
Defendants

Judgment in a Civil Case

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of defendants and against plaintiffs in this case.

Date February 14, 1990

DONALD R. BERRY
Clerk

(By) Deputy Clerk
/s/ Kenneth J. Mulholland
KENNETH J. MULHOLLAND
Supervisor.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 89-0050

JAMES F. BOYER and MARY R. BOYER, his wife,
Plaintiffs

v.

SNAP-ON TOOLS CORPORATION, KENNETH BALDWIN and KEITH A. KAISER,
Defendants

MEMORANDUM AND ORDER

[Filed May 16, 1989]

On December 13, 1988, plaintiffs filed an action against defendants Snap-On Tools (Snap-On Tools), Kenneth Baldwin, and Keith A. Kaiser, in the Court of Common Pleas of Lebanon County, Pennsylvania. On January 9, 1989, defendants filed an answer to the complaint, which answer admitted that defendants Kaiser and Baldwin were Pennsylvania residents (Complaint at ¶ 4, Answer at ¶ 5). On the same date, defendants filed a petition for removal of the civil action based upon the allegations of diversity jurisdiction.

Defendant's petition for removal asserted diversity jurisdiction on the grounds that the in-state defendants, Kaiser and Baldwin, were fraudulently joined into the state action as sham defendants, for the sole purpose of voiding and defeating the removal of the instant action to federal court. The removal petition set forth three basis for the allegation of fraudulent joinder: (a) the complaint does not state a cause of action against those

individual defendants; (b) those individuals are alleged to have acted in the interests of their employer, Snap-On Tools, and not to benefit themselves, therefore their actions are privileged under Pennsylvania law; and (3) plaintiffs executed a complete and binding release of any and all claims against Baldwin and Kaiser (Petition for Removal at ¶ 4).

On January 29, 1989, plaintiffs filed a motion to remand and for attorney's fees and costs, arguing that the case was removed improvidently and that this court is without jurisdiction because of a lack of complete diversity. This court has reviewed the entire record and is of the opinion the in-state defendants would prevail in a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement. The arguments and cases cited by defendants are persuasive and for the sake of brevity will not be restated by the court. Because the release is likely to be dispositive of plaintiffs' claims against Baldwin and Kaiser, a denial of plaintiff's motion to remand is required.

Therefore, IT IS ORDERED THAT plaintiff's motion to remand and for attorney's fees and costs is denied.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: May 5, 1989.